No. 10-591

IN THE

# Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,

*Petitioner,*

—v.—

RBC CAPITAL MARKETS CORPORATION, LEONARD SCHNEIDER, LESLIE SCHNEIDER, SCOTT SCHNEIDER and SUSAN SCHNEIDER,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Leonard Schneider, Leslie Schneider, Scott Schneider and Susan Schneider (the "Schneiders") respectfully request that the Court deny the petition of Highland Capital Management, L.P. ("Highland") for a writ of certiorari (the "Petition") to the Court of Appeals for the Second Circuit. The other respondent, RBC Capital Markets, LLC (f/k/a RBC Capital Markets Corporation) ("RBC"), has filed a brief in support of the Petition (the "RBC Brief").[1]

## OPINIONS BELOW

The Petition cites numerous prior decisions in this case. Petition at 1-3. Its presentation of the three decisions relating to the New York Court of Appeals' determination in 2007, upon certification of a question by the U.S. Court of Appeals, that the notes at issue in this case are "securities" under New York law (*id.* at 2) is misleading. The Petition implies that these three decisions bear on the decision of the U.S. Court of Appeals as to which Highland is seeking review, and that they "illustrate the vital importance of the outcome of this proceeding to the national securities markets." *Id.* Neither statement is true. As the U.S. Court of Appeals recognized, the prior decisions in this case have "no pertinence to the issues on this appeal."

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[1] RBC also has filed a separate petition for a writ of certiorari, seeking review of the same decision. RBC's petition, which the Schneiders will oppose, was docketed on November 26, 2010 as No. 10-682.

App. 8. While the 2007 decision by the New York Court of Appeals on a question of state law may have been significant to those who buy and sell securities, the questions presented in the Petition and the disposition of this case are not. *See* pages 26-28, *infra*.

## STATEMENT OF THE CASE

The Petition's Statement of the Case does not set forth the nature of Highland's claims or the basis for the Court of Appeals' decision. Instead, it makes vague assertions that apparently are designed to create a false impression about the Court of Appeals' decision. That false impression provides the foundation for much of the Petition.

Highland and RBC claim that the Schneiders, acting through their broker, Glen Rauch of Glen Rauch Securities, entered into a binding oral contract to sell to RBC nine promissory notes (the "Notes") issued by McNaughton Apparel Group, Inc. for 51% of their face value, and that the Schneiders breached that contract. App. 2. Highland sued the Schneiders as a third-party beneficiary of that alleged contract. RBC, against which the Schneiders had asserted third-party claims, brought cross-claims including breach of contract against the Schneiders. After a jury trial, the Schneiders moved for judgment as a matter of law and alternatively for a new trial, pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure. The district court denied the Schneiders' motion in all respects. App. 56-59. On appeal, the Schneiders argued that the

district court had committed a number of legal errors in denying their motion.

The Court of Appeals addressed only one of the Schneiders' arguments: that the district court should have granted judgment in their favor as a matter of law, under Rule 50(b), based on the legal insufficiency of the evidence to prove elements that it concluded were required under state law to establish Rauch's authority to enter into a binding contract for the Schneiders to sell the Notes. App. 3. The Court of Appeals reviewed *de novo* the district court's denial of the Schneiders' Rule 50(b) motion. App. 8.

An important component of the Court of Appeals' legal analysis was its construction of a letter agreement executed by Rauch and RBC at the outset of their discussions about the Notes (the "Letter Agreement"), which provided as follows:

> We both understand that the consummation of any transaction remains in the sole discretion and satisfaction of the [Schneiders] and [RBC], including without limitation with respect to price.

App. 4. The Court of Appeals construed the Letter Agreement as unambiguously limiting Rauch's actual authority by requiring that the Schneiders consent to the price of any contract to sell the Notes. App. 3-4, App. 11. The Letter Agreement also affected the Court of Appeals' analysis of Rausch's apparent authority. App. 13. In denying the

Schneiders' motion, the district court had devoted a single paragraph to the sufficiency of the evidence of Rauch's authority, in which it mentioned the Letter Agreement but did not discuss its effect on Rauch's authority. App. 65-66.

The Court of Appeals repeatedly stated that it considered the trial evidence in the light most favorable to Highland and RBC. App. 3, App. 8, App. 20. Applying that standard, it reviewed the evidence of the conversations between Rauch and RBC, in particular those on the day on which Highland and RBC asserted that Rauch entered into a contract to sell the Notes. App. 4-7.[2] The court concluded there was "*no* evidence" that Rauch had actual authority to enter into the contract without the Schneiders' approval, that "*nothing* in the record supports a finding" that such approval was given, and that there was "*no* evidence" suggesting that respondents induced RBC to believe that Rauch had any authority beyond the limitations set forth in the Letter Agreement. App. 10, App. 12, App. 13 (emphasis added).

Based on its legal construction of the written agreement, on New York agency law, and on these gaps in the evidence, the Court of Appeals held that the Schneiders' Rule 50(b) motion should have been granted since, when the evidence is viewed in the

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[2] The contents of all but one of the conversations between RBC and Rausch were undisputed because RBC recorded them. App. 4-6.

light most favorable to Highland and RBC, a reasonable jury could not have found in their favor. App. 8-9. It explained:

> We conclude that, taking all ambiguous or disputed evidence in the light most favorable to [Highland and RBC], but construing it in light of the extensive undisputed evidence, a jury could not reasonably find it more probable than not that Rauch had received authorization to sell [the Notes] at fifty-one, that RBC reasonably believed he had received authorization to sell at fifty-one, or that RBC reasonably understood his words as expressing agreement to sell at fifty-one.

App. 20. The court unanimously reversed the judgment in favor of Highland and RBC and ordered that judgment be entered in favor of the Schneiders. App. 21.

The Petition's Statement of the Case implies that the Court of Appeals chose to ignore "specific evidence" that "could have been relied on by the jury" and instead gave weight to contrary evidence. Petition at 7-8; *see also* RBC Brief at 3 (arguing that the Court of Appeals did not review "significant pieces of evidence that supported the jury's findings"). That suggestion is misleading. The Court of Appeals discussed some of this evidence, including evidence that the district court had cited in denying the Schneiders' motion with regard to Rauch's authority. App. 11-12; *compare* App. 66. None of that evidence filled in what the Court of

Appeals regarded as legally dispositive gaps in the evidence of Rauch's authority. Contrary to Highland's contention (Petition at 8-9), the Court of Appeals did not balance competing evidence, ignore evidence that supported Highland's claim, or substitute its own version of the facts for the jury's or the trial court's version. Highland argues, but does not demonstrate, that the court did anything other than construe disputed facts in the light most favorable to Highland and RBC and determine, from those facts and inferences, and the undisputed facts, that the district court erred.

Highland's statement that the Court of Appeals' use of a New York standard in reviewing either the sufficiency of the evidence or the district court's denial of the Schneiders' Rule 50(b) motion would have led to a different result (Petition at 8-9) also is misleading. Highland does not mention that this is sheer speculation. It does not explain that the Court of Appeals had no occasion to consider whether it would have reached a different conclusion under a New York standard of review because no party argued that such a standard should apply.

## REASONS FOR DENYING THE PETITION

The Petition seeks review by this Court to decide two questions: whether state or federal law controls the sufficiency of the evidence under Rule 50(b) in diversity cases, and whether *de novo* appellate review of a denial of a Rule 50(b) motion violates the Reexamination Clause of the Seventh Amendment to the U.S. Constitution. The Petition should be denied for several reasons, including the following:

- Neither of these questions was raised in or decided by the Court of Appeals.

- Nearly all of the federal courts of appeals utilize the federal standard for the legal sufficiency of the evidence in diversity cases.

- In this case, the selection of the sufficiency-of-the-evidence standard had no impact since there is no appreciable difference between the New York and federal standards.

- Decisions on Rule 50(b) motions are determinations of law that are subject to *de novo* appellate review, and that review does not implicate the Reexamination Clause of the Seventh Amendment to the U.S. Constitution.

- The Court of Appeals decided no issues of importance to anyone beyond the parties to this case.

## I. HIGHLAND'S POSITIONS WERE NOT RAISED IN OR DECIDED BY THE COURT OF APPEALS.

Highland's position is that the Court of Appeals erred because it was (a) obligated under the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to assess the sufficiency of the evidence of Rauch's authority under the New York standard (Petition at 10-16), and (b) required by the Reexamination Clause of the Seventh Amendment to the U.S. Constitution, as construed in *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996), to review the district court's denial of the Schneiders' Rule 50(b) motion for abuse of discretion, rather than *de novo*. Petition at 17-28. Absent from the Petition is a representation by Highland that it (or RBC) made either argument to the Court of Appeals. Neither of them did. Highland seeks to present both of these positions for the first time in this Court.

Highland and RBC submitted a joint appellees' brief in the Court of Appeals (the "Highland/RBC Brief"), in which they stated that appellate review of the district court's denial of the Rule 50(b) motion was *de novo*, and that the sufficiency of the evidence under Rule 50(b) was governed by the federal standard set forth in a recent Second Circuit opinion. Highland/RBC Br. at 22.[3] In arguing in the district

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[3] In the section entitled "Standard of Review," Highland and RBC stated:

court and the Court of Appeals that the Schneiders were not entitled to relief under Rule 50(b), Highland and RBC did not refer to the New York standard or cite any New York cases on this point. The Highland/RBC Brief did not mention the Seventh Amendment, the Reexamination Clause or *Gasperini*.[4] Nor did the Court of Appeals raise *sua sponte* either of the issues that Highland seeks to present to this Court.

Insisting that issues be briefed in and considered by the courts of appeals ensures that this Court has the benefit of the lower court's thinking, allows

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> In reviewing *de novo* the District Court's denial of a motion for judgment as a matter of law, the Court is to draw all reasonable inferences in the light most favorable to the non-moving party, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence. *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 467 F.3d 107, 118 (2d Cir. 2006).

Highland/RBC Br. at 22. *SR Int'l Bus. Ins. Co.* was a diversity case that relied on the federal standard of *de novo* review set forth in *Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004), a Title VII case.

[4] In a petition for rehearing in the Court of Appeals, RBC contended that the Court of Appeals, by failing to adhere to its own standard for reviewing jury findings, had "dangerously encroach[ed] upon the jury's Seventh Amendment functions," but RBC did not suggest that the Court of Appeals' review should have been limited by New York law or by the Reexamination Clause. Pet. for Reh'g En Banc at 12.

issues of importance to ferment and percolate through the judicial system, and often leads to better-considered decisions. Accordingly, as the Court stated in *Glover v. United States*, 531 U.S. 198, 205 (2001), "In the ordinary course we do not decide questions neither raised nor resolved below." *Accord, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999) ("Because this argument was neither raised nor considered below, we decline to consider it."). The fact that a petition raises questions that were not decided by the court below because they were never raised in that court "is ordinarily fatal to the petition." Robert L. Stern et al., SUPREME COURT PRACTICE 459-60 (8th ed. 2002).

The Petition should be denied on this ground, apart from whether either of the questions presented is substantial. As shown below, neither of them is.

## II. WHETHER TO APPLY FEDERAL OR STATE LAW ON THE SUFFICIENCY OF EVIDENCE UNDER RULE 50(B) IS NOT A SUBSTANTIAL QUESTION.

The Petition seeks review so that this Court can decide whether, when a federal court sitting in diversity decides a Rule 50(b) motion for judgment as a matter of law, it should assess the legal sufficiency of the evidence under federal law or under the forum state's law. Petition at i, 10-16. Highland relies on this Court's observation in *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 445 (1959), that the lower courts disagreed on this "important question."

In the half-century since *Dick* was decided, litigation under Rule 50(b) has clarified two things. First, the federal courts have reached near-uniformity in applying the federal standard for legal sufficiency of the evidence in diversity cases, reducing if not quite eliminating any split among the courts of appeals. By citing out-of-date authority, the Petition understates that dynamic.

Second, the federal and many state standards for the legal sufficiency of the evidence are now very similar. As a result, any lingering divergence of views on this issue is of limited practical importance. That is demonstrably true in this case since the federal and New York standards are virtually the same, making the Petition's first question irrelevant to the outcome in this case. Rather than confront that problem, Highland tries to confuse matters by pointing to a difference between federal and New York law *on a different issue*: the level of deference that an appellate court gives to a trial court's decision on the legal sufficiency of the evidence. Petition at 7-9, 14-15. On that issue, the view of the courts of appeals is unanimous: they all review *de novo* district courts' determinations of the sufficiency of the evidence in diversity cases, as the Court of Appeals did here.

### A. The Petition Overstates the "Circuit Split" on This Issue.

The Petition asserts that the Courts of Appeals for the Sixth, Seventh and Eighth Circuits "have held" that federal courts should apply the forum

state's standard of sufficiency of the evidence when deciding a Rule 50(b) motion in a diversity case. Petition at 12 & n.10. That overstates the weight of the authority that applies state law. The Seventh Circuit, which at one time looked to the forum state's sufficiency standard, *e.g., Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266, 1270 (7th Cir. 1993), has been applying the federal sufficiency standard since 1994. *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 941-42 (7th Cir. 1996); *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 335 (7th Cir. 1994). The Eighth Circuit explained, in a case cited by Highland (Petition at 13 n.10), that it generally applies the forum state's sufficiency standard but sometimes applies the federal standard. *Carper v. State Farm Mut. Ins. Co.*, 758 F.2d 337, 340 (8th Cir. 1985). Only the Sixth Circuit remains steadfast in applying state standards.

Since the 1959 decision in *Dick* a number of courts have noted that the federal and state sufficiently standards are so similar that the choice between them makes no difference in the resolution of a Rule 50(b) motion. As the Eighth Circuit explained in *Carper,* "Obviously, consideration of which standard is appropriate is insignificant where both the state and federal standards are in fact substantially similar." 758 F.2d at 340. Noting the similarity between the Iowa and federal standards, it applied both without distinguishing between them. *Id.* The Second Circuit has made the same observation about the federal and New York standards. *See* page 15, *infra*; *see also, e.g.,*

*Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 429 (2d Cir. 1999) (similarity between Connecticut and federal standards); *Keenan v. Computer Assocs. Int'l, Inc.*, 13 F.3d 1266, 1269 n.3 (8th Cir. 1994) (similarity between Minnesota and federal standards); *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992) (similarity between Pennsylvania and federal standards).

In most cases, therefore, the decision whether to apply the federal or state standard will not affect the outcome. As shown below, this is such a case. What this Court regarded in 1959 as an important question is now largely academic.

**B. The Federal and New York Standards for the Legal Sufficiency of Evidence Are Virtually Identical.**

Even if the application of state or federal standards for sufficiency of the evidence were a potentially appropriate question for this Court's review, and even if Highland's failure to present this question to the Court of Appeals were overlooked, this case would not be the right vehicle for review. Because the New York and federal standards are practically the same, the application of one or the other would not affect the outcome. The Court of Appeals applied the following standard of the legal sufficiency of the evidence:

> [W]e view the evidence in the light most favorable to the party against which the motion was made. [Judgment as a matter of

> law] is properly granted only when, drawing all reasonable inferences regarding the weight of the evidence and the credibility of witnesses in favor of the non-movant, a reasonable jury could only have found for the movant.

App. 8-9 (citations and quotations omitted). The New York standard for setting aside a jury verdict due to legally insufficient evidence is virtually the same:

> Viewing the evidence in the light most favorable to the plaintiffs, there is no valid line of reasoning and permissible inferences that could have lead rational jurors to the conclusion they reached, the evidence was legally insufficient to support the jury's verdict and, thus, the [motion to set aside the verdict] was properly granted. . . .

*Stephenson v. Hotel Emps. & Rest. Emps. Union Local 100 of AFL-CIO*, 6 N.Y.3d 265, 271-72 (2006) (internal citation omitted).[5] The Petition does not

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[5] *See also Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997) (citations omitted):

> A trial court's grant of a . . . motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party. In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the

set forth these standards, much less compare them or explain how application of New York's would have produced a different result.

The Second Circuit, which has compared the federal and New York standards, has concluded that there is "no material difference between the two," making it unnecessary to decide which governs Rule 50 motions in diversity cases. *Willis v. Westin Hotel Co.*, 884 F.2d 1556, 1563 n.5 (2d Cir. 1989). *Accord, Mehra v. Bentz*, 529 F.2d 1137, 1139 n.2a (2d Cir. 1975); *O'Connor v. Penn. R.R. Co.*, 308 F.2d 911, 914 (2d Cir. 1962).

Given the striking similarity between the standard applied by the Court of Appeals and the one that Highland argues for, and the Second Circuit cases noting that similarity, it is very likely that application of the New York standard would have led the Court of Appeals to reach the same result. Highland is asking this Court to grant certiorari to consider a question that almost certainly will not affect the outcome of the case – and, if there is any lingering doubt on that point, it is the product of Highland's and RBC's decision not to make this argument to the Court of Appeals.

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motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.

### C. The Standard for Appellate Review of Rule 50(b) Decisions Is a Distinct Issue, as to Which All Courts of Appeals Agree.

Unable to show any impact on this case from the choice between federal and state sufficiency-of-the-evidence standards, Highland invites confusion by interspersing an analytically distinct argument that *Erie* principles require the courts of appeals to use the forum state's standard of appellate review when they review district courts' decisions on Rule 50(b) motions in diversity cases, and that New York law compels appellate courts to give deference to such decisions by trial courts. Petition 7-9, 11, 14-15. That is not the issue raised in the first question presented by Highland, is not the issue to which this Court referred in *Dick*, and is not the subject of the court of appeals decisions cited in the lengthy footnotes in the Petition. *Id.* at i, 10-14 & nn.5, 10-11. What law governs the sufficiency of the evidence and what law governs the level of appellate review are distinct questions.

Every Court of Appeals uses a *de novo* standard in reviewing Rule 50(b) decisions in diversity cases, just as they would in reviewing any other question of law decided by a district court, without regard to the appellate standard of review that would be used in the courts of the forum state. "Numerous courts in every circuit in the federal judicial system have concluded that the analysis that is employed is the same in the trial court and on appeal . . . ." 9B Charles Alan Wright & Arthur R. Miller, FEDERAL

PRACTICE AND PROCEDURE § 2524 (3d ed. 2008).[6] The Sixth and Eighth Circuits follow that rule, even where they apply the forum state's sufficiency standard. *Smith v. Leggett Wire Co.*, 220 F.3d 752, 758 (6th Cir. 2000) ("We review a district court's denial of Defendants' Rule 50(b) motion *de novo*."); *Aetna Casualty & Surety Co. v. Leahey Constr. Co.*, 219 F.3d 519, 532 (6th Cir. 2000) ("An appellate court reviewing a diversity action . . . need show no deference to the trial court's assessment of the sufficiency of the evidence before a jury, even if state law so requires."); *Hinz v. Neuroscience, Inc.*, 538 F.3d 979, 984 (8th Cir. 2008) ("Applying the same standard as the district court, this court reviews the grant of judgment as a matter of law *de novo* . . . .").[7]

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[6] *See, e.g.*, *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 13 (1st Cir. 2009); *Montgomery County v. Microvote Corp.*, 320 F.3d 440, 445 (3d Cir. 2003); *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir. 1999); *Cooper Indus., Inc. v. Tarmac Roofing Sys., Inc.*, 276 F.3d 704, 707 (5th Cir. 2002); *Wallace v. McGlothan*, 606 F.3d 410, 418 (7th Cir. 2010); *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1185 n.8 (9th Cir. 2004); *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1243-1244 (10th Cir. 2009); *Proctor v. Fluor Enters.*, 494 F.3d 1337, 1347 n.5 (11th Cir. 2007); *Novak v. Capital Mgmt. & Dev. Corp.*, 570 F.3d 305, 311 (D.C. Cir. 2009); *see also Poly-America, L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1307 (Fed. Cir. 2004) (non-diversity case).

[7] Before 1994, when the Seventh Circuit applied the state sufficiency standard in diversity cases, it reviewed district courts' Rule 50 decisions *de novo*. *Europlast, Ltd. v. Oak Switch Sys., Inc.*, 10 F.3d 1266, 1270 (7th Cir. 1993).

The Petition's first question does not control, and is not controlled by, the standard of appellate review of trial courts' decisions on motions for judgment as a matter of law. The difference between the federal and New York standards for appellate review is irrelevant to that question.

## III. WHETHER *DE NOVO* REVIEW OF DENIAL OF A RULE 50(B) MOTION CONFLICTS WITH THE SEVENTH AMENDMENT IS NOT A SUBSTANTIAL QUESTION.

The Petition asks this Court to consider whether the Court of Appeals' *de novo* review of the denial of the Schneiders' Rule 50(b) motion violated the Reexamination Clause of the Seventh Amendment. Petition at i, 17-28. The premise for Highland's position is that the Court of Appeals "review[ed] [the] jury's factual findings," in that it "evaluated the facts, weighed the evidence, and made credibility determinations." *Id.* at 23, 18. That premise is false. As this Court and lower federal courts consistently have recognized, a decision granting or denying a Rule 50(b) motion is a *legal* decision, and such decisions are subject to *de novo* review. Highland cites no authority for applying the Reexamination Clause to a court of appeals' review of a legal decision, and there is no substantial question as to whether such review violates the Reexamination Clause.

The Petition contends, alternatively, that the Reexamination Clause was violated by the Court of Appeals' erroneous application of *de novo* review. *Id.*

at i, 26-27 & n.38. If the Court of Appeals overstepped its proper role in reviewing a decision on a Rule 50(b) motion – and it did not – a grant of certiorari to review that misapplication of recognized legal rules would not be appropriate.

### A. Decisions on Rule 50(b) Motions Are Legal Determinations Subject to *de Novo* Review.

The Court of Appeals did not reverse the jury's verdict or factual findings. Rather, it reversed the district court's denial of the Schneiders' Rule 50(b) motion arguing the legal insufficiency of the evidence. Like Rule 50(b) decisions by district courts, *de novo* appellate review of such decisions – the standard followed in the federal courts – can entail close review of "all of the evidence in the record." *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1288 (10th Cir. 2000) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Nonetheless, as this Court recognized even before the Federal Rules of Civil Procedure were promulgated, determining "[w]hether the evidence was sufficient or otherwise was a question of law to be resolved by the court," not a question of fact. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659 (1935). It remains settled that Rule 50(b) motions raise issues of law, not of fact. 9B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2522 (3d ed. 2008).

One of the hallmarks of a legal determination by a federal court is that, when it is ripe for appellate

review, that review is *de novo*. As the Court stated in *Pierce v. Underwood*, 487 U.S. 552, 558 (1988), "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." All the courts of appeals review *de novo* district courts' decisions on Rule 50(b) motions. *See* pages 16-17, *supra*. "As the issue is one of law, the appellate court's review is plenary. Therefore, as innumerable cases decided over the years make clear, the appellate court's review of a Rule 50(b) motion obviously is *de novo*." 9B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2540 (3d ed. 2008).

The Petition contends that the federal courts are divided on this issue (Petition at 23) because the Tenth and Eleventh Circuits apply a less stringent standard of appellate review. *Id.* at 20. That is incorrect. The Tenth Circuit since at least 1992 has reviewed *de novo* decisions by district courts on Rule 50(b) motions. *M.D. Mark v. Kerr-McGee Corp.*, 565 F.3d 753, 761 (10th Cir. 2009); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000); *Blair v. Eagle-Picher Indus., Inc.*, 962 F.2d 1492, 1495 (10th Cir. 1992). The Eleventh Circuit also reviews such decisions *de novo*. *Howard v. Walgreen Co.*, 605 F.3d 1239, 1242 (11th Cir. 2010); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1330, 1334 (11th Cir. 1999).

### B. Appellate Review of Rule 50(b) Decisions Does Not Implicate the Reexamination Clause.

The Reexamination Clause limits certain appellate review of a jury's factual findings by providing that "no *fact* tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST., amend. VII (emphasis added). Highland's position is that the Reexamination Clause constitutionally mandates the standard of appellate review of certain *legal* determinations by district courts. That argument does not reflect the language of the Reexamination Clause, which, as this Court recognized in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 & n.11 (2001), prohibits only reexamination of a jury's finding of facts. It is not supported by any case that Highland cites. And it flies in the face of the "innumerable cases" treating decisions by district judges on Rule 50(b) motions as legal decisions subject to *de novo* review.

In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), which involved the Seventh Amendment right to a jury trial, this Court noted the roles of federal trial and appeal courts in resolving Rule 50(b) motions when it stated, "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an

appellate court granting judgment n.o.v." 386 U.S. at 322. Citing *Neely*, the Court reaffirmed the constitutionality of appellate review of Rule 50 decisions in *Weisgram v. Marley Co.*, 528 U.S. 440, 449-50, 454 n.10 (2000). *See also Nelson v. Prod. Credit Ass'n of the Midlands*, 930 F.2d 599, 604 n.6 (8th Cir. 1991) ("The Supreme Court has long held that the question of whether there is sufficient evidence to support submission of an issue to the jury is a legal determination, and that entry of judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) does not contravene the Seventh Amendment.").

This Court's pronouncements in *Neely* and *Weisgram* were peculiar if the Court believed an appellate court's entry of judgment as a matter of law, after the usual *de novo* review, violated another provision of the single-sentence Seventh Amendment. These decisions imply that, contrary to the Petition, there is no substantial issue as to whether the familiar practice of *de novo* review of denials of Rule 50(b) motions – the review that Highland told the Court of Appeals it should undertake, *see* page 8, *supra* – is unconstitutional.

### C. *Gasperini* Does Not Support the Petition's Position on the Reexamination Clause.

*Gasperini* did not involve Rule 50(b), and it does not support Highland's position. *Gasperini* held that the federal courts' use of a New York statute to challenge the excessiveness of a damage award, with

the appellate court reviewing the district court's denial of a Rule 59 motion for abuse of discretion, did not violate the Reexamination Clause. 518 U.S. at 419. Recognizing that earlier cases had deemed any appellate review of excessiveness challenges to violate the Reexamination Clause, *id.* at 434; *see* Petition at 18, the Court noted that all courts of appeals endorsed such review. 518 U.S. at 434-36. Both the nature and the standard for appellate review of decisions on Rule 50(b) motions are different – a distinction that the Petition ignores.

Justice Stevens' dissent, which agreed there was no violation of the Reexamination Clause, looked to the principle that "jury verdicts are not binding on either trial judges or appellate courts *if they are unauthorized by law*." *Id.* at 442 (Stevens, J., dissenting) (emphasis added). Justice Stevens reasoned that appellate review was permitted in *Gasperini* because it "merely identified that portion of the judgment that constitutes 'unlawful excess.'" *Id.* at 443. Appellate review of the denial of a Rule 50(b) motion, which determines whether the denial was legally erroneous, is likewise constitutional; as the Second Circuit observed in an opinion following this Court's remand, "*Gasperini* should not be read to diminish a federal Court of Appeals' obligation and power to correct a jury verdict unauthorized by law, such as a verdict supported by insufficient evidence . . . ." *Gasperini v. Ctr. for Humanities, Inc.*, 149 F.3d 137, 142 (2d Cir. 1998). In *Weisgram*, four years after its decision in *Gasperini*, this Court

confirmed that power and its constitutionality. 528 U.S. at 449-50.

Highland seeks refuge in Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice Thomas. Petition at 18-19. That dissent reasoned that the Reexamination Clause prohibited appellate review of the district court's ruling because the equivalents of appellate courts lacked authority at English common law to grant a new trial on grounds that a jury verdict was against the weight of the evidence. 518 U.S. at 455-57 (Scalia, J., dissenting). The opinion did not discuss appeals from Rule 50(b) decisions. The Petition cites no authority that supports its novel position that the Seventh Amendment limits appellate review of such decisions.

### D. This Is Not an Appropriate Case for Granting Certiorari.

Even if the Court wished to consider whether *de novo* review of the denial of a Rule 50(b) motion violates the Reexamination Clause, this would not be an appropriate case in which to consider that question. Highland argues that the Court of Appeals should have reviewed the denial of the Schneiders' Rule 50(a) petition under an abuse of discretion standard, and says that it would have affirmed the district court under that standard. Petition at 24-28. However, there is a strong likelihood that applying an abuse of discretion standard would not have changed the outcome.

The Letter Agreement was central to the Court of Appeals' determination that, as a matter of law, the evidence could not support a finding that Rauch had the authority necessary to enter into the alleged contract. App. 9, App. 11, App. 13. The district court's failure to construe or consider the impact of the Letter Agreement on Rauch's authority was legal error, and "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). The Court of Appeals concluded that there was *no evidence* to support elements that were required to establish Rauch's authority, under its view of the governing law. *See* pages 3-4, *supra*. Even under an abuse of discretion standard, reversal was likely.[8]

By its alternative contention, that the Court of Appeals erroneously applied the familiar standard of *de novo* review, the Petition seeks to transmute a contention that the Court of Appeals improperly

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[8] Highland bases its contrary position on the assertion that ten pieces of evidence (Petition at 24-25), which the Court of Appeals "did not dispute" (*id.* at 26), would mandate affirmance under an abuse-of-discretion standard. But none of this evidence supports the elements identified by the Court of Appeals. Only the first four of the ten have anything to do with Rauch. The rest pertain to the authority of one of the Schneiders to act for the others, an issue that the Court of Appeals did not reach.

scrutinized the trial record into a constitutional claim. The Court of Appeals stated an appropriate legal standard for reviewing the denial of a Section 50(b) motion (App. 8-9), and it decided the appeal under that standard. Highland cannot show it did not. But if the court did not comply with that established legal standard, its error would constitute a "misapplication of a properly stated rule of law," the correction of which ordinarily is not a sufficient basis for granting certiorari. SUP. CT. R. 10.

## IV. THE COURT OF APPEALS DID NOT DECIDE AN ISSUE OF IMPORTANCE TO NON-PARTIES.

Highland argues that a grant of certiorari is "triply justified by the national importance of the substantive question at issue in this case." Petition at 28. That "substantive question" appears to be whether Rausch had authority to enter into a binding contract for the Schneiders to sell the Notes. *See id.* at 30-31. Whether Highland and RBC provided legally sufficient evidence of Rausch's authority is a matter of importance only to the parties in this case. It is not a matter of general importance, and it provides no support, treble or otherwise, for granting the Petition.

Highland tries to support its argument by confusing another issue with that of Rauch's authority. Earlier, this case presented an issue of New York law that was of interest to the securities industry: whether the Notes were "securities" under the New York Uniform Commercial Code, making a

contract for the sale of the Notes exempt from the requirements of the New York statute of frauds. N.Y. U.C.C. LAW § 8-113(a). Recognizing the "minimal and conflicting guidance from the New York courts" on that issue, the Court of Appeals certified that question of state law to New York's highest court (App. 22, App. 51-52), which in 2007 decided that the Notes were "securities." App. 101. As a result, the Schneiders had no statute of frauds defense. Three years later, the Court of Appeals directed that judgment be entered in favor of the Schneiders on an unrelated legal basis: the legal insufficiency of the evidence of Rauch's authority. Nothing in that 2010 decision undercuts the 2007 determination by the New York Court of Appeals.

Highland tries to confound these distinct issues by stating that "the jury's verdict . . . is nothing but the logical result" of the 2007 decision that the Notes are securities. Petition at 31. It is true that Highland and RBC would not have had a triable case if the 2007 decision had upheld the applicability of the statute of frauds to a contract to sell the Notes. But the 2007 decision did not ensure that Highland and RBC would prevail on issues *other than* the statute of frauds. Nor did it suggest that written contracts like the Letter Agreement should not be given their full effect.

The unsubstantiated assertion that the Court of Appeals' requirement that the Schneiders consent to a contract for the sale of the Notes "undermines the certainty of securities trades" (*id.* at 30) is incorrect. That requirement stemmed from the Court of

Appeals' legal interpretation of the Letter Agreement. App. 3-4, App. 13, App. 19. Its decision does not suggest that this requirement would be imposed in the absence of the Letter Agreement or that the terms of that agreement are common. To the contrary, the Court of Appeals went out of its way to limit its holding to the specific circumstances of this case. *See, e.g.*, App. 11-12, App. 20. The decision that Rauch lacked legal authority is important only to parties that have entered into written contracts like the Letter Agreement. It is not clear that there are any such parties beyond those involved in this case.

## CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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